A

LOO SEE LEE v. PP

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
MOHD ZAWAWI SALLEH JCA
SURAYA OTHMAN JCA
B [CRIMINAL APPEAL NO: J-05 (M)-8-01-2017]
15 JANUARY 2018

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Appeal against conviction and sentence – Drugs found in stolen car – Whether*
C *mere presence of accused in car sufficient to prove custody and control of impugned drugs – Whether accused had sole control of car – Car where drugs were found reported stolen weeks before incident – Whether important to prove duration for which accused had possession of car from which dangerous drugs were recovered – Prosecution led two sets of evidence which contradicted one another – Whether*
D *accused ought to have been given benefit of doubt arising from inconsistencies – Whether there was failure to exercise maximum evaluation test before finding accused guilty – Whether conviction safe*

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 12(2) – Possession – Appeal against conviction and sentence – Drugs found in stolen car – Whether mere*
E *presence of accused in car sufficient to prove custody and control of impugned drugs – Whether accused had sole control of car – Car where drugs were found reported stolen weeks before incident – Whether important to prove duration for which accused had possession of car from which dangerous drugs were recovered – Prosecution led two sets of evidence which contradicted one another – Whether*
F *accused ought to have been given benefit of doubt arising from inconsistencies – Whether there was failure to exercise maximum evaluation test before finding accused guilty – Whether conviction safe*

PW2, together with a police team from the Narcotics Investigating Department, had carried out an operation called 'Ops Tapis' at a house
G which had been used as a motor workshop ('workshop'). When PW2 and his team arrived at the location, they saw the accused ('the appellant') alighting from the driver's seat of a white Lexus motorcar ('Lexus'). PW2 and his team approached the appellant and identified themselves as police officers. A body search was conducted on the appellant but nothing incriminating was
H found. PW2 then requested for the ignition key of the Lexus and the appellant retrieved the ignition key on the floor of the compound of the workshop and handed it to PW2. In the car, PW2 discovered a paper bag containing a brown envelope and a pink envelope. In the brown envelope were four transparent plastic packets containing bluish crystalline substance
I and in the pink envelope were two transparent plastic packets containing a

crystalline substance, a pink money envelope which contained four transparent packets with 435 orange pills and a rubber band tying 20 aluminium foils with the word 'Ermine 5' written on them. The appellant was then arrested and his wife ('second accused'), who had been with him in the car prior, was also arrested. Both the appellant and the second accused were charged at the High Court for trafficking in 164.92g of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') ('the first charge') and for having in their possession 0.78g of nimetazepam, an offence under s. 12(2) of the DDA ('the second charge'). At the conclusion of the trial the appellant was found guilty by the High Court and was sentenced to death for the first charge and six months' imprisonment for the second charge whereas the second accused was acquitted. Dissatisfied, the appellant appealed.

Held (allowing appeal; setting aside conviction and sentence)
Per Suraya Othman JCA delivering the judgment of the court:

(1) The mere transient presence of the appellant in the car at the material time was not sufficient to prove the basic elements of custody and control of the said drugs let alone *mens rea* possession (*PP v. Lin Lian Chen,* refd). Herein, the Lexus was reported stolen three weeks before the incident by its owner (PW8). The High Court Judge failed to take into account the fact that the appellant was in possession of the Lexus for one day only. Having possession of the Lexus at the material time, without more, was insufficient to come to a finding that the appellant had possession of the Lexus and the impugned drugs found in it. Further, the appellant did not have sole control of the car since his wife, the second accused, was seen to be with the appellant before alighting from the front passenger's seat of the car to go to a restaurant nearby. Thus, it was unclear who exactly had custody and control of the impugned drugs found in the Lexus. (paras 12, 17 & 29)

(2) The High Court Judge had accepted the evidence of PW2 completely and unreservedly, without subjecting it to a maximum evaluation in light of the other evidence from the prosecution and the defence, based on the fact that PW2 was the head of the raiding party which led to the arrest of the appellant. The evidence of PW2 was highly doubtful and the appellant ought to have been given the benefit of the doubt arising from the inconsistencies. In a case where the prosecution had led two sets of evidence, and each one contradicted the other, thus showing it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the appellant might be based. (paras 24, 26 & 28)

(3) The High Court Judge had misdirected himself when His Lordship failed to exercise the maximum evaluation test before finding the appellant to have exclusive care, custody and control of the impugned drugs found at the front passenger's seat of the Lexus. The fact that PW7 had failed to ascertain the duration for which the appellant had been in charge of the Lexus and the fact that he was not the sole occupant of the said car was crucial to this appeal. It was important to prove the duration for which an appellant had possession of a vehicle from which the dangerous drugs were recovered before imputing possession of the said vehicle. (paras 29 & 30)

(4) There was no direct and positive finding by the High Court Judge that the appellant had custody and control and knowledge of the impugned drugs found other than by relying on the presumption under s. 37(d) of the DDA. The appellant should not even have been called to enter his defence. It was unsafe to retain the conviction of the appellant. The appellant was thereby acquitted and discharged. (paras 30 & 31)

Bahasa Malaysia *Headnotes*

PW2, bersama-sama satu pasukan polis daripada Jabatan Siasatan Narkotik, telah menjalankan operasi 'Ops Tapis' di sebuah rumah yang digunakan sebagai bengkel ('bengkel'). Apabila PW2 dan pasukannya tiba di lokasi, mereka lihat tertuduh ('perayu') keluar dari kerusi pemandu sebuah kereta Lexus berwarna putih ('Lexus'). PW2 dan pasukannya mendekati perayu dan memaklumkan kepadanya bahawa mereka adalah pegawai-pegawai polis. Satu pemeriksaan badan dilakukan atas perayu tetapi tiada apa-apa dijumpai. PW2 kemudiannya meminta kunci Lexus dan perayu mengambilnya dari lantai kawasan bengkel dan menyerahkannya kepada PW2. Di dalam kereta itu, PW2 menemui sebuah beg kertas yang mengandungi satu sampul surat perang dan sambul surat merah jambu. Di dalam sampul surat perang terdapat empat paket plastik lut sinar yang mengandungi bahan kristal kebiru-biruan dan di dalam sampul surat merah jambu terdapat dua paket plastik lut sinar yang mengandungi bahan kristal, satu sampul surat merah jambu yang mengandungi empat paket lut sinar dengan 435 pil-pil dan satu tali getah yang mengikat 20 kerajang aluminium dengan perkataan 'Ermine 5' tertulis atasnya. Perayu kemudiannya ditahan dan isterinya ('tertuduh kedua'), yang berada bersamanya dalam kereta sebelum ini, juga ditahan. Kedua-dua perayu dan tertuduh kedua dipertuduh di Mahkamah Tinggi kerana mengedar 164.2g methamphetamine, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') ('pertuduhan pertama') dan memiliki 0.78g nimetazepam, satu kesalahan bawah s. 12(2) ADB ('pertuduhan kedua'). Pada akhir perbicaraan, perayu didapati bersalah oleh Mahkamah Tinggi dan dihukum mati atas pertuduhan pertama dan enam bulan penjara bagi pertuduhan kedua sementara tertuduh kedua dilepaskan. Tidak berpuas hati, perayu merayu.

Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman) Oleh Suraya Othman HMR menyampaikan penghakiman mahkamah:

(1) Kehadiran perayu semata-mata dalam kereta pada waktu material itu tidak memadai untuk membuktikan elemen-elemen asas jagaan dan kawalan dadah-dadah tersebut, lebih-lebih lagi milikan *mens rea* (*PP v. Lin Lian Chen*, dirujuk). Di sini, Lexus telah dilaporkan dicuri tiga minggu sebelum kejadian oleh pemiliknya (PW8). Hakim Mahkamah Tinggi gagal mengambil kira fakta bahawa tertuduh memiliki Lexus itu untuk satu hari sahaja. Memiliki Lexus pada waktu material itu, adalah tidak mencukupi untuk membuat dapatan bahawa perayu mempunyai milikan atas Lexus dan dadah-dadah yang terdapat di dalamnya. Selanjutnya, perayu tidak mempunyai kawalan tunggal atas kereta itu kerana isterinya, tertuduh kedua, dilihat berada bersama-sama dengan perayu sebelum keluar dari kerusi penumpang depan kereta itu dan ke sebuah restoran berdekatan. Dengan itu, tidak jelas siapa sebenarnya yang mempunyai jagaan dan kawalan dadah-dadah yang dijumpai dalam Lexus.

(2) Mahkamah Tinggi menerima keterangan PW2 secara keseluruhannya dan tidak bersyarat, tanpa membuatkannya tertakluk pada penilaian maksimum berdasarkan keterangan lain daripada pihak pendakwaan dan pembelaan, hanya berasaskan fakta bahawa PW2 adalah ketua pasukan penyerbu yang menangkap perayu. Keterangan PW2 amat diragui dan perayu harus diberi faedah keraguan oleh kebangkitan ketidakkonsistenan itu. Apabila pihak pendakwaan membentangkan dua set keterangan, dan masing-masing bercanggahan, dan menunjukkan ini tidak boleh dipercayai; akibatnya mahkamah akan diberi keterangan yang tidak boleh dipercayai dan tidak jujur untuk menjadi asas sabitan perayu.

(3) Hakim Mahkamah Tinggi tersalah arah apabila beliau gagal melaksanakan ujian penilaian maksimum sebelum membuat dapatan bahawa perayu mempunyai jagaan dan kawalan eksklusif dadah-dadah yang dipertikaikan yang ditemui di kerusi penumpang depan Lexus. Fakta bahawa PW7 gagal memastikan tempoh masa perayu bertanggungjawab terhadap Lexus dan fakta bahawa perayu bukan penghuni tunggal kereta tersebut adalah penting buat rayuan ini. Adalah penting untuk membuktikan tempoh masa perayu mempunyai milikan atas kereta di mana dadah-dadah berbahaya itu ditemui sebelum menuduh bahawa kereta itu dalam milikan perayu.

(4) Tiada penemuan positif dan tepat oleh Hakim Mahkamah Tinggi bahawa perayu mempunyai jagaan dan kawalan dan pengetahuan berkenaan dadah-dadah yang dipertikaikan itu selain bergantung pada

A anggapan bawah s. 37(d) ADB. Perayu tidak sepatutnya dipanggil membela diri. Tidak selamat untuk mengekalkan sabitan perayu. Perayu dengan itu dilepaskan dan dibebaskan.

Case(s) referred to:
Kesavan Krishnan lwn. PP & Satu Lagi Rayuan [2015] 6 CLJ 163 CA ***(refd)***
B *Magendran Mohan v. PP [2011] 1 CLJ 805 FC* ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(dist)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***

Legislation referred to:
C Dangerous Drugs Act 1952, ss. 12(2), (3), 37(d), 39B(1)(a), (2)
Penal Code, s. 34

For the appellant - Gooi Soon Seng & Choong Kak Sen; M/s Gooi & Azura
For the respondent - Adam Mohamed; DPP

[Editor's note: Appeal from High Court, Johor Bahru; Criminal No: 45A-35&36-12-2014
D *(overruled).]*

Reported by Suhainah Wahiduddin

JUDGMENT

E **Suraya Othman JCA:**

[1] The appellant was charged in the High Court at Johor Bahru together with one Foong Yoke Pei ("the second accused") for trafficking in 164.92g of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") and punishable under s. 39B(2) DDA read together with
F s. 34 of the Penal Code ("the first charge") and for having in their possession 0.78g of nimetazepam, an offence under s. 12(2) of the DDA and punishable under s. 12(3) DDA read together with s. 34 of the Penal Code ("the second charge"). The charges are as follows:

Pertuduhan Pindaan Pertama

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Bahawa kamu bersama-sama pada 31.8.2014 jam lebih kurang 3.00 petang bertempat di hadapan sebuah bengkel kereta beralamat JK 2-3, Belakang Surau Jalan Kenanga 2, Taman Plentong Baru, 81750 Masai, dalam Daerah Johor Bahru, dalam Negeri Johor Darul Takzim dalam meneruskan niat bersama kamu telah didapati mengedar dadah berbahaya
H iaitu 164.92 gram Methamphetamine, dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

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Pertuduhan Pindaan Kedua

Bahawa kamu bersama-sama pada 31.8.2014 jam lebih kurang 3.00 petang bertempat di hadapan sebuah bengkel kereta beralamat JK 2-3, Belakang Surau Jalan Kenanga 2, Taman Plentong Baru, 81750 Masai, dalam Daerah Johor Bahru, dalam Negeri Johor Darul Takzim dalam meneruskan niat bersama kamu telah didapati telah ada dalam milikan kamu dadah berbahaya iaitu 0.78 gram Nimetazepam dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 12(3) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

[2] At the conclusion of the case, the appellant was found guilty by the High Court and was sentenced to death for the first charge and six months' imprisonment from the date of arrest for the second charge whereas the second accused was acquitted by the High Court at the end of the prosecution's case for both charges.

[3] Dissatisfied, the appellant ("accused") appealed against the decision of the learned High Court Judge. We heard submissions from both parties and after perusing through the appeal records, we found merits in the appeal. Unanimously, we allowed the appeal. The conviction and sentence of the learned High Court Judge was set aside. The accused was accordingly acquitted and discharged. Herein below are our grounds.

Background

[4] On 31 August 2014, at or around 2.30pm, Inspector Mohd Shahrul bin Mohd Azmin (PW2), together with a police team from the Narcotics Investigating Department, IPD Seri Alam had carried out an operation called 'Ops Tapis' at a house which had been used as a motor workshop ("workshop") at an address JK-2-3, Jalan Kenanga 2, Taman Pelentong Baru, Johor Bahru.

[5] When PW2 and his team members arrived at the location at about 3pm, he saw a Chinese man, whom he later identified as the accused alighting from a white Lexus RX 350 motorcar ("Lexus car"), with a registration number WEE 3833 and walked towards the door of the workshop.

[6] PW2 saw the accused alighting from the Lexus car from the driver's seat. PW2 and the members of his team approached the accused and identified themselves as police officers by showing their authority cards.

PW2 then conducted a body search on the accused and found nothing incriminating. PW2 testified that when the body search was carried out on the accused, the accused looked flustered. PW2 further testified that when he saw the accused alighting from the Lexus car, he was in front of the workshop at a distance of about 7 meters and he had a clear view of the accused as his sight was not impeded by any obstruction.

[7] After PW2 had conducted a body search on the accused, PW2 then requested for the ignition key of the Lexus car. The accused then brought PW2 and the others in his team to retrieve the ignition key on the floor of the compound of the workshop. The accused picked up the ignition key of the Lexus car and gave it to PW2. PW2 and his team then brought the accused to the Lexus car to conduct an inspection of the Lexus car.

[8] PW2 then opened the front passenger door which was not locked. In the car, PW2 found a black plastic container on the dashboard. In it PW2 found a photocopy of an identity card and a driving license in the name of the accused, Loo See Lee. PW2 conducted a further search and found a paper box (P14) with the words "28 Mangosteen Plus Extra Mixed Fruit Drink" written on it on the left front passenger seat of the Lexus car.

[9] PW2 opened the paper box (P14) and found inside it a brown and a pink envelope. In the brown envelope were four transparent plastic packets: two of them contained a bluish crystalline substance while the other two (2) packets also contained a crystalline substance. In the pink envelope were two transparent plastic packets containing a crystalline substance, a pink money envelope which contained four transparent packets containing 435 orange pills and a rubber band tying 20 aluminum foils with the word "Ermine 5" written on them.

[10] PW2 then arrested the accused. The accused subsequently informed PW2 that the second accused, Foong Yoke Pei (DW3) who is his wife was with him in the car prior to this and that the second accused was having her meal at a restaurant called "Restoren Iban".

[11] PW2 and Sergeant W Massuri binti Suud then proceeded to Restoren Iban and arrested the second accused. Both the accused were then taken to the Narcotics Department, IPD Seri Alam where an arrest report was made and the exhibits marked.

Appellant's Grounds Of Appeal

[12] The grounds of appeal are as follows:

(a) the accused was not the owner of the Lexus car. The said car belonged to PW8, one Tee Jed Yeou who had reported the car stolen on 8 August 2014. There was no investigation as to who had possession of the said car from the date the car was reported stolen on 8 August 2014 till 31 August 2014 when the accused was found in possession of the car. Neither was there any DNA and/or fingerprint evidence found connecting the accused to the impugned drugs;

(b) the learned High Court Judge had erred when he failed to apply the principle in the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 where it was held that the mere transient presence of

the accused in the car at the material time is not sufficient to prove the basic elements of custody and control let alone *mens rea* possession. In that case, the investigation officer had failed to ascertain the duration upon which the accused had been in possession of the said car and this failure is fatal to the prosecution's case;

(c) the learned High Court Judge has misdirected himself when he invoked the presumption under s. 37(d) of the DDA against the accused because it is trite law that a car from which any drug is found does not satisfy the meaning of the words "anything whatsoever containing any dangerous drugs";

(d) the learned High Court Judge had also misdirected himself when he failed to appreciate that the members of the team led by PW2 did not have any personal knowledge as to where the impugned drugs were found as seen from the evidence of Corporal Azman bin Jauhari (PW5) during cross-examination;

(e) the learned High Court Judge had erred when he failed to appreciate that PW7's evidence is favourable to the accused and instead relied on the case of *PP v. Mohamed Ali* [1962] 1 LNS 129; [1962] 1 MLJ 257 in accepting the evidence of PW2 completely without subjecting it to a maximum evaluation in the light of the other evidence from the prosecution and the defence witnesses;

(f) the learned High Court Judge had misdirected himself when he failed to appreciate that there are two sets of evidence led by the prosecution and that each one contradicts the other, the consequence of which is that the court will be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have to be given the benefit of the doubt in such a situation.

Our Decision

[13] The defence submitted that the learned High Court Judge had erred when he failed to appreciate that there are two sets of evidence led by the prosecution. According to Inspector Mohd Shahrul Mohd Azmin (PW2) the arresting officer who is the main witness, when he saw the accused alighting from the Lexus car, he approached the accused and confronted him and requested for the ignition key of the Lexus car. Both he and the accused then went to inspect the Lexus car and they found drugs on the front passenger's seat of the car. PW2 was the sole witness in this incident.

[14] According to Rozaini bin Saduruni (PW6), the son of Haji Saduruni bin Enas (DW2) who is the owner of the workshop, he saw a lady alighted from the front passenger's seat of the Lexus car. This lady who is the

A accused's wife is the second accused (DW3) and she alighted from the Lexus car and went alone to the restaurant called Iban Restaurant located next to the workshop for a meal. At appeal record, vol. 2, at p. 76, PW6 stated:

> Saya ketika hendak masuk rumah untuk sembahyang zuhur. Saya cuci tangan di paip hadapan rumah. Saya nampak sebuah kereta masuk ialah
B kereta putih jenis Lexus dan saya rasa dia pelanggan. Saya tidak ingat nombor plate. Saya rasa dia pelanggan sebab setiap kali ada kereta masuk saya anggap kereta pelanggan. Kereta tersebut berhenti di hadapan bengkel dalam jarak lebih kurang 15-20 meter.
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> Setelah kereta berhenti turun seorang perempuan/wanita bangsa Cina
C daripada bahagian hadapan pintu penumpang kiri dan berjalan ke kedai makan di sebelah bengkel. Perjalanan saya nampak menghala ke kedai makan.

PW6's evidence is corroborated by the evidence of Chan Ann Nie (PW4) the owner of the Restaurant Iban.

D **[15]** The learned High Court Judge in his grounds of judgment stated that he was satisfied that the accused had exclusive care and control and management of the Lexus car to the exclusion of others premised on the fact that the accused was the last person to have driven the Lexus car moments before he was approached and confronted by PW2. In this circumstances, the
E learned High Court Judge, by relying on the presumption under s. 37(d) of the DDA, deemed the accused to have custody and control and knowledge of the impugned drugs found in P14 on the front passenger seat of the car.

[16] In the Supreme Court's case of *Lin Lian Chen (supra)*, it was held that the mere fact that the accused was the driver and the sole occupant of the car
F where drugs were found is not sufficient to prove the basic elements of custody and control of the said drugs let alone *mens rea* possession. The prosecution must also ascertain the duration for which the appellant had been in charge of the said car coupled with obtaining circumstantial evidence like DNA and/or fingerprint evidence to link and implicate the appellant. At
G p. 292 of the judgment the court states:

> *Turning to the evidence, although it is true that the Respondent was the sole occupant of the said Honda, being the driver and therefore in charge of it, the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven*
H *newspaper packages or the cigarette packet, which contained the offending exhibits.*
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> In this context, mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction. But the position here was that there was not even proof of such knowledge much less proof of
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knowledge of the presence of the offending exhibits in the seven newspaper packages or the cigarette packet. For example, *there was nothing to indicate for how long in all the respondent had been in charge of the Honda and such evidence as had been adduced indicated that he was seen only briefly at the wheel. No evidence was adduced as to whether the seven packages or the cigarette box had been dusted for fingerprints or as to whether the respondent's hands or fingernail clippings were examined for traces of heroin.*

We consider that it would not be an unfair summary of the case for the prosecution against the respondent, on the question whether it was proved that he was in custody or control of the seven packages or the cigarette packet, containing the offending exhibits, if we said that *the evidence against him in relation thereto was, essentially, of juxta position. It goes without saying that such evidence, which amounts to nothing more than grave suspicion, is totally inadequate for purposes of inferring, control or even custody of the containers concerned, sufficient to attract the presumption under s. 37(d).* Accordingly, on this ground alone, the learned Judge was perfectly entitled to rule, at the close of the case for the prosecution, that the respondent had no case to answer and to acquit and discharge him. (emphasis added).

[17] In this appeal before us, the Lexus car was reported stolen three weeks before the incident by its owner, one Tee Jed Yeou (PW8). The prosecution has not proven that the accused had possession of the Lexus car except on the day of the incident. Further, the accused did not have sole control of the car since his wife, the second accused (DW3) was seen to be with the accused before alighting from the front passenger's seat of the car to go to a restaurant called Iban for a meal.

[18] The learned High Court Judge had relied on the Federal Court's case of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 to justify and conclude that the accused was in possession of the Lexus car and thus had custody and control of the impugned drugs found in it. In *Abdul Rahman Akif (supra)*, the Federal Court had stressed on the importance of proving the duration for which an accused had possession of a vehicle from which dangerous drugs were recovered. In that case, the accused had been in possession of the car in question for seven months before he was arrested. This is distinguishable from the instant case before us where the prosecution could only prove that the accused had possession of the Lexus car on the day he was arrested.

[19] Therefore, the learned High Court Judge had failed to take into account the factors which are crucial in the case as those factors had raised doubts as to who had possession of the impugned drugs found in the Lexus car. The learned High Court Judge disregarded the evidence of PW4 and PW6 who are the prosecution's independent witnesses. The prosecution and the learned High Court Judge in their written submission and grounds of judgment did not discuss or allude to the evidence of PW4 and PW6 other

A than the fact that PW2 saw the accused threw something on the floor of the workshop. The question now is whether the learned High Court Judge had erred in law upon failing to appreciate and failing to weigh the evidence of PW4 and PW6 who saw the second accused (DW3) who is the accused's wife alighting from the front passenger seat of the car where the impugned B drugs were found as this clearly showed that the accused is not the sole occupant of the Lexus car.

[20] It is trite law that the test at the end of prosecution's case is a *prima facie* case based on a maximum evaluation of evidence. His Lordship, Alauddin Mohd Sheriff PCA, in the Federal Court's case of *Magendran* C *Mohan v. PP* [2011] 1 CLJ 805 at p. 824 held as follows:

> The test at the end of the prosecution's case is "*prima facie* case" based on a maximum evaluation of evidence. The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a *prima* D *facie* case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

[21] However, as far as the present case is concerned, there is doubt as to whether the test of maximum evaluation of evidence was exercised as the evidence of PW4 and PW6 were not appreciated or weighed by the learned E High Court Judge before he came to his decision.

[22] Further, the prosecution's version that the impugned drugs were found on the front passenger seat of the Lexus car was based solely on the evidence of PW2. Even Corporal Azman bin Jahauri (PW5), a member of the team led by PW2 on the day in question did not have any personal knowledge as F to where the impugned drugs were found and this can be seen from his evidence during cross-examination by learned counsel for the appellant where PW5 (at appeal record, vol. 2, p. 75) candidly admitted as follows:

> Ya. Saya tidak pasti di mana barang kes dijumpai tapi saya hanya di maklumkan oleh Inspektor Shahrul di mana ia dijumpai.
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> Ya, saya setuju yang Inspektor Shahrul yang memaklumkan tentang penemuan kotak ungu P14 yang mana kandungan yang ada dadah.

[23] Throughout the trial, there were evidence favourable to the accused including the evidence given by the investigation officer, Inspector Mohd H Shahrul Rizal bin Abdul Kadir (PW7) during cross-examination by the defence. PW7 at appeal record, vol. 2, p. 101 testified that according to the owner of the workshop, Haji Saduruni bin Enas' (DW2) statement, the accused and the second accused were innocent. He further testified that before the second accused alighted from the Lexus car, there was a strong possibility that the impugned drugs were not held by the second accused nor I were the drugs in the car. He ended by saying that there was no concrete conclusion that the impugned drugs belonged to the accused or the second accused.

Ya Saya ada ambil alamat Haji Saduruni. Kalau percakapan Haji Saduruni di kemukakan ia menunjukkan OKT1 dan OKT2 tidak bersalah.

Sebelum OKT2 turun, ada kemungkinan barang kes tiada di dalam pegangan dia atau pun barang kes tiada dalam kereta.

Tiada kesimpulan yang concrete yang menunjukkan barang kes adalah kepunyaan OKT 1 dan OKT2.

[24] In this case, the learned High Court Judge stated (at appeal record, vol. 1, p. 24) that he relied on the case of *Mohamad Ali (supra)*, in accepting the evidence of PW2 completely and unreservedly based on the fact that PW2 was the head of the raiding party which led to the arrest of the accused and as such PW2's evidence is credible, inherent and probable.

In *PP v. Mohamad Ali* [1962] 28 MLJ 257, the Court accepted the evidence of the police witness so long as his evidence is credible, inherent and probable. In the instant case, there was no reason why the Court could not rely on the oral evidence of SP2 who was the head of the raiding party detailing how the events leading to the 1st accused's arrest was unfolded and held that his evidence was credible and probable.

[25] With due respect to the learned High Court Judge, the legal proposition in *Mohamed Ali (supra)* that the evidence of police witnesses shall be *prima facie* accepted by the court cannot be applied universally without exception. The proposition must be applied on the facts and circumstances of each case (see *Kesavan Krishnan lwn. PP & Satu Lagi Rayuan* [2015] 6 CLJ 163).

[26] In any event, the law requires a strict maximum evaluation of the evidence of all witnesses, including police witnesses, to be conducted by the trial courts. As such, the learned High Court Judge had misdirected himself in relying on *Mohamad Ali (supra)* and accepted the evidence of PW2 completely and unreservedly without subjecting it to a maximum evaluation in light of the other evidence from the prosecution and the defence.

[27] The High Court Judge totally ignored the evidence of PW4, PW5, PW6 and PW7. If a maximum evaluation of the evidence of PW2 had been done, it would have shown that his evidence is, in fact, inconsistent with the other evidence adduced by the prosecution. The inconsistencies are as follows:

(a) according to PW2, when he saw the accused alighting from the driver's seat of the Lexus car, he and his team approached the accused, introduced themselves by showing their authority cards to the accused before conducting a body search on the accused. However, PW6 in his evidence testified that the accused alighted from the car, walked towards his father's workshop and inquired from PW6 the whereabout of his father before they were approached by four men claiming to be police officers;

(b) according to PW2, he inquired from the accused about the Lexus car key and thereupon the accused picked up the key which was on the floor of the workshop and gave it to PW2. Whereas PW6's version is that a police officer inquired from PW6's father, Haji Saduruni bin Enas (DW2) and the accused about the car key and thereupon the police officer, DW2 and the accused searched for the key and the police officer found the key on the floor of the workshop after a 30 minutes search;

(c) further, according to PW2, all the impugned drugs were found inside the box (P14) whereas a perusal of the search list, P9, prepared and signed by PW2 himself showed that the box (P14) only contained four packets of the incriminating substance and the other three items were listed separately.

[28] We observed that the evidence of PW2 is highly doubtful and the accused ought to have been given the benefit of the doubt arising from the inconsistencies in evidence as highlighted above. We agreed with the defence that in a case where the prosecution has led two sets of evidence, and each one contradicts the other, thus showing it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have to be given the benefit of the doubt in such a situation, and the accused ought not to have been called to enter his defence at the end of the prosecution's case.

Conclusion

[29] It is unclear who exactly had the custody and control of the impugned drugs found in the Lexus car. The learned High Court Judge had failed to take into account the fact that the accused was in possession of the Lexus car for one day only. We are of the view that having possession of the Lexus car for one day, or at the material time, without more, is insufficient to come to a finding that the accused had possession of the Lexus car and the impugned drugs found in it. This is in line with the principles as laid down in the case of *Lin Lian Chen (supra)* and *Abdul Rahman Akif (supra)* where the Supreme Court and the Federal Court respectively had specifically stressed on the importance of proving the duration for which an accused had possession of a vehicle from which dangerous drugs were recovered before imputing possession of the said vehicle.

[30] Further, the learned High Court Judge had erred when he failed to exercise a maximum evaluation of the testimony of the prosecution's witnesses, especially the evidence of PW2 *vis-a-vis* the evidence of PW4, PW5, PW6 and PW7 at the end of the prosecution's case. One cannot discount the contradictions in the evidence of PW2 and the evidence of PW4, PW5, PW6 and PW7. The learned High Court Judge had misdirected

himself when he failed to exercise the maximum evaluation test before finding the accused to have exclusive care, custody and control of the impugned drugs found at the front passenger's seat of the Lexus car. The fact that PW7 had failed to ascertain the duration for which the accused had been in charge of the Lexus car and the fact that he was not the sole occupant of the said car was crucial to this appeal. Further, there was no direct and positive finding by the learned High Court Judge that the accused had custody and control and knowledge of the impugned drugs found in P14 other than by relying on the presumption under s. 37(d) of the DDA. In these circumstances, the accused should not even have been called to enter his defence.

[31] In the upshot, we are of the view, that it is unsafe to retain the conviction of the accused. We therefore, unanimously, allowed the appeal and set aside the conviction and sentence of the learned High Court Judge. The accused is thereby acquitted and discharged.